No. [redacted] 222

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[redacted] FOR [redacted] AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12, 822

THE CITIZENS BANK & TRUST COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court

For The District of Columbia

Camden R. McAtee
1021 Tower Building
Washington, D. C.
Attorney for Appellant.

United States Court of Appeals
For the
District of Columbia Circuit
FILED SEP 9 1955
Joseph W. Stewart
CLERK

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APPENDIX FOR APPELLANT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CITIZENS BANK AND TRUST COMPANY OF BLOOMINGTON, INDIANA
Administrator d.b.n. of the estate of Joseph Kelly Kerr, deceased,
P. O. address as above.
Plaintiff,
v.
THE UNITED STATES OF AMERICA,
Defendant.

CIVIL ACTION NO. 5156-54

FILED DEC. 4 - 1954

COMPLAINT FOR RECOVERY OF JUDGMENT DEBT

For complaint for recovery of a judgment debt of the United States to plaintiff, in the principal sum of $7404.75, this plaintiff, The Citizens Bank and Trust Company of Bloomington, Indiana, Administrator de bonis non of the estate of Joseph Kelly Kerr, deceased, respectfully states:

1. Plaintiff, at the times hereinafter mentioned, is a foreign administrator, appointed and qualified, pursuant to orders duly entered by and in the Circuit Court of Monroe County, State of Indiana, then and now having jurisdiction of the estate of said Kerr, and of this plaintiff because the residence of decedent, at the time of his death, and the principal office of plaintiff were in said county and state; by amendment of the corporate charter of plaintiff, on March 29 1945, the corporate name of plaintiff, Citizens Loan & Trust Company, under which it was originally appointed as Administrator, de bonis non, of and for said Kerr estate, was changed to its present name The Citizens Bank and Trust Company of Bloomington, Indiana.

2. The principal amount in controversy herein is in excess of Three Thousand ($3000) Dollars, jurisdiction over this action for

recovery upon a judgment debt of the United States, is conferred by 28 U.S.C., 1346, and, for its prosecution by this plaintiff as a foreign administrator, by 20 D. C. Code, 505, (1940).

3. On June 30, 1942, in this Court, in Law Action No. 70830, captioned Elizabeth Kerr, Admx. of the Estate of Joseph Kelly Kerr, deceased, et al., vs. The United States of America, to which action and its proceedings, reference is made for greater certainty, and, in which, this plaintiff under its former name was duly substituted as plaintiff, upon suggestion of the death of Elizabeth Kerr of record, during its pendency in the United States Supreme Court, the following judgment order was duly entered of record, and has been thereafter in full effect as now herein stated, viz:

> "Pursuant to the mandate of the Supreme Court of the United States duly filed herein on June 12, 1942, which recites the substitution as respondent in and before said Supreme Court of Citizens Loan & Trust Company, administrator de bonis non of the Estate of Joseph Kelly Kerr, Deceased, in the place and stead of the original plaintiff herein, Elizabeth Kerr, Administratrix of said Estate, as the result of suggestion of her interval death, and which severally orders that the case be so continued and maintained by and in the right of said substituted plaintiff, and that the judgment of the United States Court of Appeals for the District of Columbia recited in said mandate be and is reversed, and that the cause be remanded to this Court for reinstatement of its certain judgment by this Court in conformity with the opinion of the said Supreme Court, and this Court being advised, it is this 30th day of June, 1942:
>
> "ORDERED AND ADJUDGED: That the certain judgment of this Court entered on January 9, 1941, for recovery from the defendant, the United States, of $8,227.50, as of April 5, 1940, by the plaintiff, Elizabeth Kerr, Administratrix as aforesaid, be and the same is reinstated as always in full force and effect and forthwith payable, but subject to the amendment hereby ordered and made that the said recovery be and is payable to the substituted plaintiff, Citizens Loan & Trust Company, Administrator de bonis non of the estate of Joseph Kelly Kerr, deceased, subject to the payment to Camden R. McAtee, plaintiff attorney of record, of 10% thereof, for legal services herein, and in reduction of the amount payable to said substituted plaintiff.

6 4. On December 7, 1942, this Court duly entered its order in denial of motions on behalf of the United States, filed on July 3, 1942, and upon September 13, 1942, each of which was premised that this plaintiff, to be entitled to the proceeds of said judgment order by payment, must first satisfy this Court the estate of decedent Kerr would not escheat under the laws of his last place of residence, and which motions tended to alter materially the provisions of said judgment order until so denied.

5. (a) On or about March 7, 1943, plaintiff states, as upon information and belief that the Attorney General, duly certified his determination that no appeal was to be, or had been taken, upon the order of denial of December 7, 1942, also, that the said judgment order of June 30, 1942, was then deemed the final end of the litigation, and, also, that, thereupon, the Department of Justice forwarded said judgment order to the Administrator of Veterans Affairs, as being a final judgment rendered against the United States by a district Court, for payment according to its provisions, upon settlement by the General Accounting Office, in accordance with the award of said Administrator of the necessary moneys from the military and naval insurance appropriation available to the Veterans Administration for the payment of the judgment.

5. (b) Plaintiff further states that this plaintiff, in its fiduciary capacity herein disclosed, and said Kerr estate were not in any manner, indebted to the United States, at the time of entry of said judgment order on June 30, 1942, or at any time thereafter, and are not now indebted, in any manner, to the United States.

6. Plaintiff states the proceedings in said Law Action No. 70830, evidence the payment of $822.75, for account of said judgment recovery,
7 to the attorney of record for plaintiff for his legal services in said action, and do not evidence any payment or other disposal of the balance of said judgment recovery in the remaining principal amount of $7404.75; that plaintiff has demanded payment of said balance and its payment has always been refused; that said refusal is collateral attack upon said judgment order by impugnment of its judicial finality by summary administrative or executive refusal to give effect to its provisions; for

its forthwith payment and said refusals of payment have effected, and continue to effect summary withholding, taking keeping and conversion of property of plaintiff and said estate without right or due process by law, and with consequent continuing damage to plaintiff and to said estate.

Wherefore, plaintiff, The Citizens Bank and Trust Company of Bloomington, Indiana, Administrator de bonis non of the Estate of Joseph Kelly Kerr, deceased, prays:

The entry of orders granting judgment in recovery to plaintiff against the United States in the principal sum of $7404.75, due and unpaid as of, and since April 5, 1940, also in recovery of such additional sums as the circumstance of the case appear to entitle plaintiff, also granting and providing the necessary administrative proceedings for the payment of the recoveries so ordered, for costs and for all other proper relief.

* * * * * *

8 [FILED FEBRUARY 7, 1955]

MOTION TO DISMISS

Comes now the United States of America by its attorney, the United States Attorney, and moves this Honorable Court to dismiss the complaint herein for failure to state a claim upon which relief may be granted.

* * * * * *

9 [FILED FEBRUARY 7, 1955]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

This action was filed on December 6, 1954. It appears from the face of the complaint herein that the judgment upon which the suit is brought was entered by this Court on June 30, 1942, over twelve years and five months prior to the filing of the complaint. Section 15-102 of the District of Columbia Code provides that the life of a judgment shall

be brought thereon after the running of such period. It failing to appear that action has been taken to extend the judgment under the provision of Title 15, District of Columbia Code (1951) and in accord with the Rules of this Court, it is submitted that the complaint herein should be dismissed for failure to state a claim upon which relief may be granted. Dutton v. Parish, 34 App. D. C. 393 (1910).

* * * * * *

[FILED FEB. 10, 1955]

Plaintiff Response to Defendant Motion to Dismiss the Complaint.

For response to same, plaintiff, Citizens Bank and Trust Company, etc., Administrator, etc., by its attorney, states the Motion of defendant to dismiss the Complaintis without sufficient basis, and should be denied, for cause shown in annexed Points and Authorities.

* * * * * *

[FILED MAY 13, 1955]

PROCEEDINGS

THE CLERK: No. 6, The Citizens Bank & Trust Company of Bloomington, Indiana, v. The United States.

(Discussion off the record.) (Hearing, Mar 2, 1955.)

THE COURT: It is agreed between counsel for the plaintiff and counsel for the defendant that the complaint herein be amended so as to allege that judgment was originally entered in this case on June 30, 1942, that on July 3, 1942, a motion to vacate was filed, and on September 13, 1942 a motion to stay was likewise filed, and that these two motions, namely, the motion to vacate and the motion to stay, were denied by the court on December 7, 1942.

Is that accurate?

MR. HAMILTON: It is perfectly accurate from our standpoint.

(Discussion off the record.)

(Thereupon, at 11:30 a. m., the hearing in the above-entitled cause was adjourned.)

* * * * * *

[FILED MAR 8 - 1955]

ORDER

This cause having come on for hearing on defendant's motion to dismiss and plaintiff's opposition thereto and the Court having heard oral argument and having been fully advised in the premises, it is this 8th day of March 1955,

ORDERED, That the complaint be and it is hereby dismissed.

* * * * * *

[FILED MAR 12, 1955]

MOTION BY PLAINTIFF FOR REHEARING, ETC.

Plaintiff, Citizens Bank and Trust Company, Administrator d.b.n. of Estate of Joseph Kelly Kerr, deceased, by its attorney, moves the Court for entry of its orders:

In grant to plaintiff of rehearing upon the defendant Motion to Dismiss plaintiff Complaint for failure to state a sufficient cause of action, and

In relief to plaintiff from the Order of Dismissal of plaintiff Complaint entered herein on March 8, 1955, and

Files Points and Authorities as cause herefor.

* * * * * *

[FILED MAR 30 - 1955]

ORDER

Upon consideration of plaintiff's motion for rehearing and defendant's opposition thereto, and it appearing to the Court that good cause has not been shown therefor, it is this 30th day of March, 1955,

ORDERED that the motion be and it is hereby denied.

Here are omitted: - because same appear in the Petition for grant of Writ of Caertiorari,

R.7-11- The per Curiam and Concurring opinions of the Court of Appeals, decided December 20, 1956;

Also

R. 12 The Judgment of the Court of Appeals, dated December 20,

PETITION OF APPELLANT FOR REHEARING

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,822

CITIZENS BANK & TRUST COMPANY
of Bloomington, Indiana, Administrator
d. b. n. of the Estate of Joseph Kelly Kerr,
Deceased,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

CAMDEN R. McATEE
1021 Tower Building
Washington, D. C.
Attorney for Appellant.

Filed February 11, 1957

Robert I. Thiel, Printer
Washington, D. C.
EX 3-0625

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Point of appeal: (a) District limitations not applicable, or (b) if applicable, defense by plea instead of motion is necessary	3
Parenthetically: Because per curiam excludes limitations from consideration, said limitations are plainly not applicable, nevertheless, to the instant final judgment because of its statutory situation as to payment	3
The sufficiency of appellant points justify reversal:	
Appellee posed new issues, - (1) neither sovereign consent nor precedent justify judgment upon judgment against the United States, and (2) the 6-year federal statute bars the claim	3, 4
Parenthetically: (because P.C. excludes said issues by nonconsideration) (1) is plainly rejected in appellee precedents, cited on other proposition, posed but not decided by P.C. that C. of C. has jurisdiction of judgment on judgment because appropriation is made after and not before entry of original judgment; 2nd issue of six-year statute falls out as appellant proceeding is ancillary and not independent action, per FRCP 81 and Local R. 30	3
The insufficiency of appellee contentions justify reversal.	
The new ground, on which the parties were not heard, in the P.C. for dismissal of the appeal, that appellant would be no better off than before by the new judgment, is not sustained by the Hetfield decision	5
The P.C. conclusion is not justified by the premises	4
The instant case is exactly the Benedict case, except that it is about a judgment in the same court.	4
Finding, as the P.C. does, that claimant relief would be no more than previously obtained, the C. of C. in Benedict does not relegate claimant to mandatory proceeding.	5
Instead, finding non-payment of a judgment of another federal court contrary to its provisions, the C. of C., proclaiming the finality of the judgment, extends its jurisdiction to such judgment, and gives full relief provided in the foreign judgment, although more than the C. of C. might give on the original claim.	5
Local precedents uphold relief in the court granting the original judgment by ancillary proceeding therein instead of independent proceedings against recalcitrant officials	6
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UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 12, 822

CITIZENS BANK & TRUST COMPANY
of Bloomington, Indiana, Administrator
d. b. n. of the Estate of Joseph Kelly Kerr,
Deceased,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

PETITION OF APPELLANT FOR REHEARING

Above appellant, by its attorney, respectfully petitions this Honorable Court for entry of its orders, in grant of rehearing herein, to be inclusive of withdrawal of the pending opinions and decision, published on December 20, 1956, of further oral argument, and of reconsideration of said appeal (preferably en banc because of the unusual case).

Sufficient relief to appellant is submitted to be judicial finding and order below, in revival from dormancy of the final judgment hereinafter identified, and that the appellant's right to dutiful administrative performance of lawful acts necessary for payment and satisfaction of said judgment was and is absolute and not subject to administrative refusal of such performance.

The appeal is unusual, of first instance, involving the fundamental citizen right to recover the proceeds of a money judgment from the

United States.

This petition would respectfully present the pending opinions and decision, that put aside the grounds relied upon by the parties, that find the appeal without substance, that order same dismissed below upon an entirely different ground; are not responsive to appellant claim presented as in the following circumstances:

On December 4, 1954, in its proceeding filed in the District Court below, appellant, alleging neither appellant nor its fiduciary estate was or is ever indebted in any manner to the United States, claimed all general relief, as well as special relief being re-entry of judgment against the United States in the principal sum of $7404.75, the unpaid balance of a prior final judgment for $8227.75 recovered against the United States by appellant in a prior action between the parties in said District Court, as duly entered below, on June 30, 1942, pursuant to and by direction of a mandate of the Supreme Court of the United States. Appellant alleged the United States had expressly consented to be sued by appellant in said prior action, and had provided for payment of any resulting final judgment administratively from an available permanent appropriation, also, that, on December 7, 1942, the District Court entered its order in denial of pending motions of the United States, ..ed on July 3, 1942, and September 13, 1942, which sought to require appellant, to be entitled to payment of said judgment, to satisfy the Court its proceeds, as estate of the insured, would not escheat under the laws of the State of residence of insured, also, that on March 7, 1943, the Attorney General certified the order of denial had not and would not be appealed, whereby the judgment was deemed statutorily final as the end of litigation, and was forwarded to the Veterans Administrator for settlement by the General Accounting Office and administrative payment from the available appropriation, also, that the record in the prior action discloses administrative payment of $822.75 as an attorney fee provided in said judgment, but does not disclose payment or disposal of the judgment balance of $7404.75, also that demand by appellant for such payment in performance

of the judgment was and is summarily and administratively refused, which refusal was and is impugnment of its judicial finality and attack collaterally upon said judgment.

The present appeal is from the order entered below in dismissal of the appellant proceeding upon motion of the United States that the District Lex-fori limitations barred its prosecution and rendered it an insufficient claim for relief. As points of appeal, appellant brief only presented the inapplicability of the Lex-fori, or, else, that plea of same as affirmative defense was necessary.

Parenthetically, although the per curiam opinion excludes limitations from consideration, the Lex fori is plainly shown as not applicable. Assuming the District statute gave the judgment a life of 12 years from the time when it was first enforcible, such time would be statutorily and administratively run either from March 7, 1943, or from the time thereafter when the GAO settlement was effected. In either aspect, the 12 year life would extend to or beyond March 7, 1955, whereby the appellant proceeding was timely when instituted on December 4, 1954. (cf. Teller v. United States, 113 Fed. 463, (CCA-8), quoted on page 11 of Appellant Reply Brief).

As the District Lex-fori is not applicable, reversal on this single point, as determinative of appellant appeal, is proper.

Appellee, the United States, sought to widen the appeal by contentions, first, that neither sovereign consent nor precedent justified the appellant proceeding for judgment upon a prior judgment against the United States, and, second, that the federal six-year statute barred the appellant proceeding.

Parenthetically again, such first contention is not disposed of in the per curiam opinion and is fully rejected by the Court of Claims opinions in the precedents cited in said opinion as upholding another proposition advanced but then put aside by the per curiam opinion. The precedents were cited to uphold that Court of Claims jurisdiction of a

proceeding for judgment upon a prior judgment was based upon the fact that its judgments were made payable by subsequent specific appropriations, and not by previous general appropriation as in the case of the appellant judgment rendered in the District Court. However, specific appropriation as prerequisite to payment of a judgment of the Court of Claims does not appear. On the contrary, R.S. 1089, in effect until repealed in 1948, provided for payment of Court of Claims judgments, - "out of any general appropriation made by law for the payment and satisfaction of private claims . . ." Furthermore, the Benedict opinion recites that the Brown, O'Grady, Bonnafon and Norton cases were recoveries of claimant interests in accumulated proceeds, in the Treasury, of government sales of claimant property; also that the Weld case was claimant recoupment of previously advanced expenses of litigation. In such cases, appropriation was not necessary.

The second appellee contention, of the six-year statute, may well have been added as defense because appellant brief said appellant proceeding below was a new and independent action. This error and mistake, as a matter of law, appellant reply and supplemental brief corrected by establishing appellant proceeding was an ancillary continuance of the original action, essentially the revivor of the original judgment from dormancy, and was authorized, in substitution for the abolished writ of scire facias, generally by FRCP No. 81, and specifically by Local District Rule No. 30, discovered since issue of the per curiam, and pertinently as follows:

> A judgment may be revived against a judgment debtor on motion served with notice of hearing by the marshal or a person personally appointed to make service . . .

As appellant proceeding is not an independent action, the six-year statute does not apply.

The merit of appellant proceeding, despite all the appellee contentions, is submitted established by the foregoing.

There only remains the new aspect, put forward in the per curiam, in denial of all merit in appellant proceeding upon the single ground:

> "Petitioner seeks nothing more than a reaffirmation of his first judgment . . ."
>
> "It is a suit against the United States in which no issue not already litigated has been raised."

This new aspect is justified by Hetfield v. United States, as dismissed because there was no appropriation for payment of the judgment, and no new issue was raised. But, herein, is appropriation and summary refusal after entry of the judgment to give it due administrative performance.

This is a different case, wholly justified by the cited Benedict case. The opinion notes the action is upon a final judgment of another federal court, payable from available appropriation, partially so satisfied, and partially not so satisfied because of administrative refusal to pay that part of the adjudged recovery. The opinion also notes original doubt of the jurisdiction of the Court of Claims because the second judgment would allow claimant nothing beyond that allowed by the original judgment. The opinion upholds jurisdiction of the claim as founded upon the act of Congress that granted the appropriation. Illustrative of judicial interest in the finality of a judgment as conclusive against its revision except by the court that renders it or by appellate order, the opinion widens the jurisdiction of the Court of Claims to actions upon final judgments of other Federal courts, as requiring precise performance of them, although their relief is such as the Court of Claims could not give.

To say the Benedict claim, or appellant claim, cannot be asserted because the further relief would be no more than the original relief given to claimant, is to reason in a circle; such conclusion is not justified by the premises; the per curiam is unjust in rejecting appellant claim as not entitled to relief.

Relief for appellant being of interest, it is not necessarily manda-

mus as the per curiam intimates. The Court of Claims did not relegate Benedict to mandamus.

Courts may give pleadings effect to obtain and afford substantial justice. (Keiser v. Walsh, 73 U.S. App. D.C., 118 F. 2d 13; Peoples Gas Co. v. Federal Power Commission, 75 Idem. 235, 127 F. 2d 153; DeVito v. Hoffman, 91 Idem. 263, 199 F. 2d 468; Bartlett v. Bartlett, 94 Idem. 190; 221 F. 2d 508.)

In case of necessity, an appeal proceeding may become of mandatory effect, (Magnetic E.& M. v. Dings Mfg., 178 F. 2d 866; Steccone v. Morse Starrett P. Co., 191 F. 2d 197; Arrowhead Co. v. The Aimee Lykes, 193 F. 2d 83).

In United States v. Forbes, 51 App. D. C. 248, 278 Fed. 331, this Court, with extensive citation, holds, the only remedy of claimant on an insurance contract is exclusively the statutory action in which the appellant judgment was entered. Proper ancillary relief is therefore submitted to be exercised in the Court below in the pending anciliary proceeding of the appellant, instead of in independent original action against recalcitrant administrative officials.

Seeking and abiding by the discretion of the Court,

Respectfully submitted,

CAMDEN R. McATEE
1021 Tower Building
Washington, D.C.
Attorney for Appellant.

SERVICE AND CONSENT

Service of true copy of above Petition is acknowledged, and it is consented same may be filed and thereafter printed in final form as provided in the amended Rule of Court, this 11th day of February, 1957.

Attorney for Appellee.

CERTIFICATE OF GOOD FAITH

Pursuant to Rule, I hereby certify I have filed this Petition for Rehearing in good faith, as believing it has merit, and not for any purpose of delay.

Respectfully,

CAMDEN R. McATEE
Attorney for Appellant.

Court of Appeals caption omitted.

Before : Bazelon, Washington and Danaher,
Circuit Judges in Chambers.

ORDER.

Filed
Feb 25, 1957
Jos. D. Stewart
Clerk.

Upon consideration of appellant's petition for rehearing, it is

ORDERED by the Court that the aforesaid petition for rehearing be, and it is hereby, denied.

Dated : February 25, 1957. Per Curiam.

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-ooo-

Before: Edgerton, Chief Judge, Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

ORDER.

Upon consideration of appellant's petition for rehearing, wherein appellant moves that the rehearing be in banc, it is

ORDERED by the Court that insofar as appellan moves for a rehearing in banc said petition be, and it is hereby, denied.

Filed
February 25, 1957
Jos. W. Stewart
Clerk.

Per Curiam

Circuit Judge Wilbur K. Miller did not participate in the foregoing order.

Dated: February 25, 1957.

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Caption of Court of Appeals here omitted.

DESIGNATION OF RECORD.

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of Certiorari, in the above entitled cause, and include the following:

1. The Appellant Appendix, annexed to Appellant's Brief, being the only Appendix.
2. Opinions.
3. Judgment.
4. Petition for rehearing.
5. Orders denying petition for rehearing.
6. This designation.
7. Clerk's certificate.

Service, certificate and Stipulation here omitted.

Filed May 9, 1957.
Joseph [illegible], Clerk.

-oOo-

Caption omitted.

Certification of Clerk to Record.

Dated May 17, 1957

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